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Supreme Court of the United States

October Term, 1954.

No. 138

IRVING TRUST COMPANY and ERNEST CRAWFORD MAY, as Executors of the Will of CHARLES H. HASTINGS, Deceased,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., New York 7, N. Y.—REctor 2-6978—1955

Index.

	Page
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statutes Involved	2
Statement	2
Decisions Below	8
Reasons for Granting the Writ	14
Conclusion	29
Appendix A—Statutes and Constitutional Provisions Invoked	31
Appendix B—Opinion Below	36
Judgment Below	42

CITATIONS:

Blair v. Commissioner, 300 U. S. 5, 9-10	12, 27
Brewster v. Gage, 280 U. S. 327 (1930)	18
Cabrera v. Am. Col. Bk., 214 U. S. 224, 231	6
C. I. R. v. Pierce, 146 F. 2d 388, 390 (2nd Cir.)	25
Clark v. Allen, 331 U. S. 507, 517	23, 28
Com'r v. First National Bank of Atlanta, 102 Fed. 2d 129	18
Commercial National Bank of Charlotte v. U. S., 196 Fed. 2nd 182 (4 Cir.)	25
Dartmouth College v. Woodward, 4 Wheat. 518	25
Davis v. Davis, 305 U. S. 32, 40	27
Dimock v. Corwin, 99 Fed. 2d 799	18
Dumont's Estate v. C. I. R., 150 Fed. 2d 691, 693, 3 Cir.	12, 25, 27
Durlacher v. Durlacher, 123 F. 2d 70, 71 (9th Cir.)	27
Edwards v. Slocum, 264 U. S. 61, 62-63	18
Gould v. Gould, 245 U. S. 151, 153	18

Page

Hale v. Anglim, 140 F. 2d 235, 236 (9th Cir.) 25
Hart v. Mut. Ben. L. Ins. Co., 166 Fed. 2d 891, 893, 895, 896, 2 Cir., cert. den. 335 U. S. 826 12
Helvering v. Safe Deposit Co., 316 U. S. 56, 63-64 ..... 11, 13, 18, 26
Helvering v. St. Louis Trust Company, 296 U. S. 39 17, 26
Helvering v. Rhodes Estate, 117 Fed. 2d, 509, 510, 8 Cir. 12, 23, 28
Housman v. C. I. R., 105 Fed. 2nd 973, 975, 976, cert. den., 309 U. S. 656 19
Hull v. Continental Ill. Nat'l Bank & Trust Co., 177 F. 2d 217, 220 (7th Cir.) 25
Humphrey v. Millard, 79 Fed. 2d 107 18
Huron Corp. v. Lincoln Co., 312 U. S. 183, 193, 194 27
Hutchinson v. Ross, 262 N. Y. 381, 398 6

In re Sage's Estate, 122 Fed. 2nd 480 (3rd Cir.), cert. den. 314 U. S. 699 ..... 22, 24, 25
Ithaca Trust Co. v. U. S., 279 U. S. 151, 155 18

Jones v. Corbyn, 186 F. 2d 450, 453 (10th Cir.) 25

Knowlton v. Moore, 178 U. S. 41 ..... 17, 26

Lederer v. Stockton, 260 U. S. 3 (1922) 18
Levey v. Smith, 103 Fed. 2d 643 (7th Cir.) (cert. den. 308 U. S. 578) 24
Lyeth v. Hoey, 305 U. S. 188, 193 ..... 11, 12, 14, 20, 21, ... 23, 25, 26, 27, 28

Matter of Barber, 205 Misc. 596, aff'd 283 App. Div. 785, leave to appeal denied 283 App. Div. 970 ..... 12, 13
Matter of Bemis, 116 Misc. 516 15
Matter of Cook, 187 N. Y. 253, 259 18
Matter of Dana, 206 Misc. 1038, 1042 12
Matter of Martin, 255 N. Y. 359 ..... 12, 13

Page

Matter of Sidman, 157 Misc. 675, 679 ..... 10, 15
Matter of Wadsworth, 142 Misc. 717, aff'd 236 App. Div. 712 15
Matter of Watson, 124 Misc. 216 ..... 10, 15
Matter of Wilcox, 194 N. Y. 288 18
Matter of Williams, 162 Misc. 507, 509, affirmed 254 App. Div. 741 23
Mertz v. Hickey, 162 Fed. 2d 403, 405 (2nd Cir.) 25
Middleton v. U. S., 99 Fed. Supp. (E. D. Pa.) 801 20

Raytheon Prod. Corp. v. C. I. R., 144 F 2d 110, 114 (1st Cir.) (cert. den. 323 U. S. 779) 25
Robbins v. C. I. R., 111 Fed. 2d 828, 832, 1 Cir. .. 12, 28
Robbins v. Comm'r, 111 Fed. 2d 828 18

Tennant v. Dudley, 144 N. Y. 504 16
Texas v. Florida, 306 U. S. 398, 410 13
Thompson v. Commissioner, 123 Fed. 2d 816 (2 Cir.) 20, 21, 22

U. S. v. Burnison, 339 U. S. 87, 91 27
U. S. v. Fox, 94 U. S. 315, 320 ..... 23, 27
United States v. Provident Trust Co., 291 U. S. 272, 281 18

Wager v. Wager, 89 N. Y. 161, 166 18
Warner v. Commissioner, 72 F. 2d 225, 226-227 (C. A. A. 2d 1934) 18
West v. Smith, 101 U. S. 263, 273 ..... 6, 16
White v. Thomas, 116 F. 2d 147 (5th Cir.) (cert. den., 313 U. S. 581) 25
Wright v. Wright, 225 N. Y. 329, 339-340 23

Y. M. C. A. v. Davis, 264 U. S. 47, 50 18

STATUTES:

	Page
New York Personal Property Law, Section 17(b)	18
I. R. C., Section 162	18
Federal Estate Tax Law, Section 812(d)	2
U. S. Constitution, Article IV, Section 1	2, 27
Amendment X	2, 12
Amendment V	2, 26
Internal Revenue Code, Section 812d, Title 26	2
New York Decedent Law, Section 19	2, 3, 7, 11, 27
United States Code, Section 1346 (R. 2) Title 28	2
Section 1738, Title 28	2, 27

OTHER AUTHORITIES:

Warren Heaton on Surrogate's Prac., Vol. II, Sec. 188, par. 4(f) (n)	10
Scott on Trusts, Vol. 2, Secs. 178, 188, 192, 244	12
Brown & Bradley, Century Dictionary	23

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No. .

IRVING TRUST COMPANY and ERNEST CRAWFORD MAY, as Executors of the Will of Charles H. Hastings, Deceased,
Petitioners,
against
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled cause on April 5, 1955.

(Reference to Respondent's Appendix will be preceded by the letter R. Reference to the Appendix hereto will be preceded by the letter A.

Opinions Below.

The opinion of the District Court (168-170) is reported in 129 F. Supp. 303. The opinion of the Court of Appeals (A37-A41) is as yet unreported.

Jurisdiction.

The judgment of the Court of Appeals was entered April 5, 1955 (A41-A42). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether on an abandoned will contest brought to collect a claimed debt against the estate of decedent paid, as proven by immutable Surrogate's Court records, by charity trustees pursuant to order of the Surrogate's Court of New York County from vested charity funds on the condition precedent that decedent's will was invincible, and admittedly not paid in intestacy but paid by charity trustees to save vast expense and delay to the charity to vacate the stay of probate by withdrawal of objections filed, is taxable under Section 812 (d) of the Federal Estate Tax Law.

Statutes Involved.

The Constitutional provisions and statutes involved are Article IV, §1 and Amendments V and X of the Constitution of the United States, Title 26, §812d, Internal Revenue Code, §19 New York Decedent Estate Law, and Title 28, §1738, United States Code, the pertinent parts of which are set forth in Appendix A of this petition in the order in which they arise.

The basis for federal jurisdiction in the Court of first instance is Title 28, United States Code, §1346 (R. 2).

Statement.

The case was presented in the District Court for the Southern District of New York, by motion for summary judgment mainly based on special guardians' reports to the Surrogate and the report of the New York Attorney General, and on reports of proceedings in the New York Surrogate's Court and the order of the Surrogate's Court based on these reports (8, 20-41, 90-100), in a proceeding to compromise a claim against the dece-

dent's estate necessarily made under §19 of the New York Decedent Estate Law (A32-A34), corroborated by affidavit and documentary evidence.

Respondent, the defendant below served no affidavits in opposition to the plaintiffs' moving papers, and admitted in the Court below that no question of fact was involved. The respondents cross-moved for summary judgment based on the pleadings, on the pre-trial order herein, and on the Surrogate's Court documents enumerated in the pre-trial order (167, 4-5).

The decedent, Charles H. Hastings, who died on February 21, 1942, after providing for a few small annuites and legacies to mainly former employees, left his entire estate by will made January 23, 1939, to a trustee for the establishment and maintenance of a free sanitarium for the cure, care and prevention of tuberculosis, from which his father had died, as a memorial to his father (42-52), the sanitarium to be set up immediately after the death of the testator and during the life of his surviving personal executor, to whom he had had imparted clear instructions for the establishment and maintenance of the sanitarium (45, 46, 112-114). The entire responsiblity for the erection and equipment of the sanitarium was delegated to his surviving personal executor (48). Decedent had on January 26, 1928, made a similar will (54-60).

Ida Cargill, a ninety-five-year-old cousin of the half blood, furnished a statement of decedent's relatives also of the half blood to the attorneys for the estate required for probate purposes (130-132).

Ida Cargill, her daughter, brother and cousin (70-71), residuary legatees under the will of decedent's sister, Lizzie H. Holme, who died in 1914, jointly agreed at the instance and persuasion of Ida Cargill to divide their

residuary legacy under Lizzie H. Holme's will with the decedent who was not named in the will (23, 114-115, 130, 147-148, 159, 163). The decedent received about $130,000 under this agreement (25, 151). While the entire family was heartily in favor of the establishment of the sanitarium, Ida Cargill was incensed and piqued because her $130,000 was not returned to her by the decedent's will, so as to afford relief to the relatives in dire need and consented to contest the will on the ground of vagueness and uncertaintly (127-128, 114-115, 130, 159, 163).

On June 19, 1942, the return day of the citation for probate of the Charles H. Hastings will, the attorneys who had procured the statement of the next of kin from Ida Cargill filed objections to probate for Ida Cargill and the other competent next of kin alleging testamentary incapacity and defective execution of the will, if the will was ever executed (21, 131, 107-108). Later a Special Guardian, Jack L. Nicoll, was appointed for Thomas Townsend, an eighty-five-yead-old incompetent cousin of the half blood (20-22).

Immediately thereafter, conferences were had at which the attorneys for the contestants repeated the statements they had made before objections were filed, that the decedent was guilty of "rank ingratitude" in not providing by his will for the return to Ida Cargill of her $130,000 which had been given the decedent because of his certainty that a later will by his sister made provision for him and no such will was found (147-148, 152, 40-41) and later added that Ida Cargill's attitude would be quite different if decedent by will had reimbursed her (142). The attorneys for the contestants vehemently threatened to institute a domicile issue on the ground that the decedent was in reality a resident of California and that he had been guilty of fraud in avoiding and evading California income taxes, and would carry that issue to

the highest court possible (132, 134, 135, 136-138, 148). He then stated his grounds of testamentary incapacity (133-144). He threatened that after rendition of the decision of the highest court to which it could be taken on the issue of domicile, he would then try the testamentary incapacity issue, which he declared would be in California (134-138).

The representatives of the estate and their attorneys unanimously decided that the charges of testamentary incapacity were unsubstantial and frivolous and adamantly refused any settlement on that ground but were willing to discuss settlement of the Ida Cargill claim to save the vast expense and delay entailed in defending mainly the domicile issue, possible double taxation, the Cargill claim and submitting the necessary evidentiary proof that the objections were unsubstantial (17-18, 20, 30-31, 159, 117, 118-121, 124, 139, 141, 153-157, 158, 160, 163).

On September 15, 1942, Special Guardian Nicoll intervened, writing in his report to the Surrogate that "he had to, of necessity, disregard any claims relative to whether or not Mr. Hastings was capable of executing a valid will" (26), and stated that he would confine himself solely to the reimbursement of the Ida Cargill claim. He added that otherwise there might be a delay of ten to twenty years before the worthy charity was set up, thus admittng that any will contest would fail (141).

Thereupon the will contest was entirely abandoned and negotiations were continued, confined in their entirety to the repayment of the Ida Cargill claim (144-146. On October 14, 1942, the Ida Cargill claim was settled by an agreement to pay $182,500 which was one-half of the $130,000 claim and interest to date (161-162, 163). The Estate undertook the defense and payment, if any, of Estate taxes (132-146). The recipients of

the money to pay gift and income taxes and all other taxes (74, 86).

Ida Cargill's attorney contended, *inter sese*, that because Ida Cargill and her daughter had contributed half of the monies from the decedent's sister's residuary estate paid to decedent they should have more than the incompetent who had not seen nor heard of the decedent for a period of more than fifty years. The Surrogate later ruled that Ida Cargill should have more than the incompetent (23-24, 27-28, 29, 30, 35, 36-38, 74-75, 94).

The fact that the will contest was abandoned, that the Ida Cargill claim was paid by the charity Trustees from charity funds, and that the payees were not paid in intestacy is proven conclusively without resorting to any other evidence by the report of Special Guardian Nicoll, corroborated by three other Special Guardians, the report of the Attorney General of New York, and the oral discussion in open court based on such reports, on which the approval of the compromise is based (20-41). These State Court records were competent to prove the actual consideration for the payment. In *Hutchinson v. Ross*, 262 N. Y. 381, 398, the New York Court of Appeals stated the rule:

> • • • "'The consideration of a written instrument is always open to inquiry, and a party may show that the design and object of the agreement was different from what the language, if alone considered, would indicate.' *Baird v. Baird*, 145 N. Y. 659, 664; cf. *Juilliard v. Chaffee*, 92 N. Y. 529.)"

The same rule prevails in the Federal Court, *West v. Smith*, 101 U. S. 263, 273; *Cabrera v. Am. Col. Bk.*, 214 U. S. 224, 231.

The compromise agreement approved by the Surrogate recites the Ida Cargill claim (70-71) and that the

Executors are to pay "in full compromise and settlement of all controversies respecting said testator's will and proceedings in respect thereof," and it is the intention of the contestants to compromise and settle all controversies everywhere, whether based on the filed objections or otherwise, so as to effect the New York and California probate of the will of testator (72-74). The recipients of the money then executed a general release to the executors and trustees of the estate (82-83).

On the motion to approve the compromise pursuant to Section 19 of New York Decedent Estate Law (A32-A34), the Surrogate opened the hearing by stating that he had read the Special Guardians' reports and was ready to approve the compromise (36). Three other Special Guardians had been appointed and all the reports stated that the compromise was based on the Ida Cargill claim, as did also the Attorney General of the State of New York, who approved of the payment on that basis (20-35, 36). The discussion then proceeded in open court as to the manner in which the amount received in payment of the Ida Cargill claim should be divided amongst the recipients (36-41).

Another special guardian for the infant contingent remaindermen under the will of Ida Cargill, who had since died (24, 145) referring to the settlement of the Cargill claim stated to the Surrogate (38):

> "It is a return for this 1914 compromise of Ida Cargill, which permitted the decedent here to participate in the estate of his deceased sister, Lizzie Hastings Holme."

The attorney for Ida Cargill, who was also the attorney for the other contestants including the ancillary guardian of the incompetent, vehemently asserted that Ida Cargill should receive more than the other recipients and more than the incompetent (36-38). He based that

argument on the statement that the settlement made was based upon the Ida Cargill agreement of 1914 (37). As a result of that discussion under the order of the Surrogate Ida Cargill received $7,500 more (24, 74-75, 94-95).

The order approving the compromise agreement was based on these same Special Guardians' reports and the report of the Attorney General of New York (90-91). The decree admitting the will to probate also based on these reports (97-98) recited that the decedent was fully competent to make a will (99).

Decisions Below.

This action was brought to recover $57,496.56 refund of Estate tax after claims for refund of the tax paid on this claim on the settlement thereof were disallowed (R. 1-14).

The charity paid a tax of $99,100.35 (6, R. 1-14) and in the pretrial order waived and abandoned other claims for refund of $41,606.79 in taxes paid on $167,912.26, and, in addition, claims for attorneys' fees (3) leaving only the above claim.

The District Court denied petitioners' motion for summary judgment and dismissed the complaint and granted the respondent's cross-motion (168-171).

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court (A42-A43).

The Court of Appeals finds that the objections filed were meritless (A37).

The Court also found that the issue of domicile and payment of taxes both in New York and California threatened vast expense and delay in setting up the tuber-

culosis sanitarium and provided a powerful incentive to compromise (A37).

The Court errs, however, in stating that it was difficult to find some basis upon which to negotiate (A37). The demands and threats for reimbursement of the Cargill claim made prior to the return day of the citation for probate having been ignored, the objections were filed, which indefinitely stayed probate, for the sole purpose of enforcing payment of the Ida Cargill claim (18, 41, 127-128, 130-131, 132, 133, 136-138, 141-143, 144-146). Threats of tax penalties in evading California income taxes, the vast expense of trying the domicile issue, possible double taxation and the expense of defending them, were made to enforce payment of the Cargill claim. The construction and equipment of the tuberculosis sanitarium were stayed indefinitely pending the vastly expensive determination of these issues. There was also the expense of submitting the necessary proof to demonstrate by legal evidence that the testamentary incapacity objections were frivolous and unsubstantial before the will could be probated (155).

There is absolutely no evidence to sustain the statement of the Court below that the amount of the Cargill claim was the amount the executors were willing to pay in settlement of the will contest (A38). The unanimous evidence, is uncontradicted in the summary judgment motion that the charity trustees firmly refused to settle the will contest on any ground stated in the objections and the will contest was abandoned.

While the compromise agreement provided as stated by the Court below that the Estate would pay the Estate taxes, if any (A38), the opinion omits to state as did the briefs of the respondent in both Courts below that by the same agreement, gift taxes and income taxes were to be borne by the recipients of the money (86,

74) and that the compromise agreement recites the Cargill claim (70-71).

The compromise agreement was not, as stated by the Court below (A38), the ordinary form of agreement made in such cases. It was a most unusual agreement.

Contrary to the usual form, the petition for approval of the compromise agreement alleges that the contestants were told with great positiveness that it was the considered opinion of the charity trustees that there was no merit to the objections and upon the accumulated evidence the contestants would be defeated (20). The petition adds that the settlement was made to save long delay and vast expense to the charity (20). The special guardian Nicoll in his report to the Surrogate reiterated the latter statements (30-31) all of which is contrary to the usual form of compromise agreement. Warren's Heaton on Surrogate's Prac., Vol. II, Sec. 188, par. 4 (f) (n); *Matter of Sidman,* 157 Misc. 675, 679; *Matter of Watson,* 124 Misc. 216.

The dissertation of the Court below on the difference between a pre-trial order and a motion for summary judgment is totally irrelevant to the issues presented (A39-A40).

A pre-trial order issue formulated by the Court on the written consent of the respondent was "What was the probability that the will contestants would succeed in establishing their objections to the probate of decedent's will dated January 23, 1939"? (7).

The District Court on defendant's motion struck out under this order all evidence demonstrating that the objections were insubstantial and that the payment was not paid in intestacy, as immaterial (168-169). The Court below, however, expressly declared the objections unsubstantial (A37) and it is unnecessary to pursue the question.

The Court below incorrectly stated that the District Court passed over the supposed issue as to the Ida Cargill "claim" as having no substance whatever (A40).

No reference is made by the District Court to the Ida Cargill claim (169-170). On the contrary, the Court did say that it was inclined to agree with the statement of petitioners (170) made in the brief that "there is no tax case on record akin to on its facts and issues resembling the issues presented in this case." That Court did say that if the contestants' claims (vast expense of trying the domicile claim, double taxation claim, Ida Cargill claim and proof of the claim that the objections were unsubstantial and the indefinite delay in erecting the tuberculosis sanitarium) were entirely devoid of merit as plaintiffs allege, paying out $182,500, in settlement of such claims, even in the interest of expediency was hardly justified (169). That Court also stated that in this case $182,500 was paid to persons outside the category of charitable organizations and was not spent for erecting or maintaining the sanitarium, and was not spent for charity, but went to those having a valid status to contest the will (170). Despite the immutable Surrogate's Court records to the contrary, the Court below stated that there was no such "claim" as the Ida Cargill "claim" nor was the compromise agreement based upon any payment in settlement of any such "claim" (A40). The so-called issue about the Ida Cargill "claim" continues the Court below, was a pure sham (A40).

The summary answer to both the statements of the District Court and the Court below is that the Courts below had no power to review the review of the Surrogate approving the compromise of the Ida Cargill claim and the judgment of the fiduciaries under Section 19 of New York Decedent Estate Law (A32-A34), which is final and binding on the Federal Court. *Lyeth v. Hoey*, 305 U. S. 188, 193; *Helvering v. Safe Deposit Co.*, 316 U.

S. 56, 63-64; *Dumont's Estate v. C. I. R.*, 150 Fed. 2d 691, 693, 3 Cir.; *Blair v. Commissioner*, 300 U. S. 5, 9-10, and cases cited; *Helvering v. Rhodes Estate*, 117 Fed. 2d 509, 510, 8 Cir.; *Robbins v. C. I. R.*, 111 Fed. 2d 828, 832, 1 Cir.; *Hart v. Mut. Ben. L. Ins. Co.*, 166 Fed. 2d 891, 893, 895, 896, 2 Cir., cert. den. 335 U. S. 826.

Lyeth v. Hoey, supra (p. 193), held that what was done up to and including the approval of the compromise agreement is exclusively in the province of the State Court binding on the Federal Court. The special guardian's report finds that on October 13, 1942 (after four months' negotiations on the Ida Cargill claim) the contestants raised the question of Estate taxes (28-29). Therefore, this claim was no tax ruse as unjustifiably and without jurisdiction intimated by the Court below.

The Court below had no power, in addition, to metamorphose an agreed statement of facts into an action for fraud to evade estate taxes and on an agreed statement of facts to cast animadversions on the acts of the Surrogate, his Special Guardians, the Attorney General, and the fiduciaries striving to do their duty as fiduciaries of a charity trust.

The attempt of the Court below to reverse the Surrogate was unwarranted and violated petitioner's rights under Article IV, Section I and Amendment X of the U. S. Constitution (A35).

Under the New York State law, it is the imperative duty of the trustee to uphold the trust, to prevent loss of time and money even though it results in compromise of baseless claims. Scott on Trusts, Vol. 2, Secs. 178, 188, 192, 244 and cases cited; *Matter of Barber*, 205 Misc. 596, aff'd 283 App. Div. 785, leave to appeal to Court of Appeals denied 283 App. Div. 970; *Matter of Martin*, 255 N. Y. 359; *Matter of Dana*, 206 Misc. 1038, 1042.

Matter of Barber, 205 Misc. 596 (*supra*), upheld the right of executors to make a compromise agreement, of estate taxes, with the State of Connecticut, to avoid the expense of a trial of the issue of domicile and to avoid possible double estate taxes, as here. The hardship, the Court held, of double taxation authorized under *Texas v. Florida*, 306 U. S. 398, 410, should be avoided if a compromise can be made. The Court held that *the compromise of taxes can benefit an estate not only in avoiding double taxation but in obviating the expenditure of large sums in litigation.* The executors were justified, the Court held, in not disclosing to their adversaries the real reason for the compromise to save vast expenses hereinbefore referred to.

In *Matter of Martin*, 255 N. Y. 359 (*supra*), affirming 136 Misc. 51 (affirmed, without opinion, 229 App. Div. 772), the State of Connecticut applied to the New York Surrogate, demanding that the assets of the estate be remitted to the State of Connecticut for readministration to enable the State of Connecticut to collect estate taxes and property taxes and penalties. Chief Judge Cardozo agreed with the Surrogate that the application should be denied (362) in the exercise of sound discretion because it would result in a depletion of the assets of the estate by the unnecessary expenses of double administration to the injury of the beneficiaries of the estate. This is exactly what the charity trustees did here.

The discussion of the *Helvering v. Safe Deposit Co.* case (A40-A41) is now moot and wholly irrelevant. Petitioners stated on four occasions in the brief in the Court below that evidence under the pre-trial order was admissible as determinative of petitioners' contention that the issues in the pseudo will contest were not substantial and that an attack on this evidence as on demurrer to the evidence would conclusively so prove. The conclusion

would then follow that the payment was not made to the contestants in intestacy, but on the condition precedent that the will was valid and that the money was paid on a subject matter totally irrelevant to the validity of the will, in the exclusive judgment of the representatives of the Estate, to avoid the vast expense and delay in setting up the charity trust. The Court below has found that the objections were meritless. Allocation is now unnecessary. The money was not paid in intestacy pursuant to substantial objections to the will.

Reasons for Granting the Writ.

1. The decision of the Court below is directly in conflict with the decision of this Court in *Lyeth v. Hoey,* 305 U. S. 188, which clearly holds that when objections have been filed to the probate of a will and a compromise is made, in order to justify an estate tax here it must appear that the money was paid in intestacy on proved substantial objections to the probate of the will and thus result in a taking against the will in intestacy in the amount of the settlement.

In *Lyeth v. Hoey,* this Court prefaced its ruling by a statement of the steps taken in the State Court to determine that a substantial issue was presented (p. 189). The Court said (195-196):

> "Issues are not to be framed unless it appears from statements by counsel of expected evidence or otherwise that there is a 'genuine' question of fact supported by evidence of such a substantial nature as to afford ground for reasonable expectation of a result favorable to the party requesting the framing of issues. *Briggs v. Weston,* Mass. , 2 N. E. 2d 466; *Smith v. Patterson,* 286 Mass. 356, 190 N. E. 536. Petitioner satisfied that condition and the probate court directed the framing of jury

> issues. It was in that situation, facing a trial of the issue of the validity of the will, that the compromise was made by which the heirs, including the petitioner, were to receive certain portions of the decedent's estate."

The record on appeal shows that the petitioner there argued (record on appeal in C. C. A., pages 92-93) that it is imperative under the law that the issue be substantial. "There must be a 'genuine' question of fact supported by evidence of a substantial nature as to afford ground for a reasonable expectation of a result favorable to the party requesting the framing of issues." The law is the same in New York.

> *Matter of Wadsworth,* 142 Misc. 717, aff'd 236 App. Div. 712; *Matter of Sidman,* 154 Misc. 675, 679-680; *Matter of Watson,* 124 Misc. 216; *Matter of Bemis,* 116 Misc. 516.

The determination of the question of whether a substantial issue is presented will necessarily be reviewed as on demurrer to the evidence on a motion at the end of the contestant's case to dismiss the objections on the ground that there was insufficient evidence to raise a question of fact for the jury. If the evidence does not survive the motion necessarily the issue is not substantial. Here, the will contest was abandoned and there could be no decision that the issue was substantial.

The Court's statement as italicized by us, proves our contention that to be taxable the recipients must have taken the money paid by intestacy based on substantial objections (196).

> "There is no question that petitioner obtained that portion, upon the value of which he is sought to be taxed, because of his standing as an heir and of *his claim in that capacity.* It does not seem to be questioned that if the contest had been fought to a

> finish and petitioner had succeeded, the property which he would have received would have been exempt under the federal act. Nor is it questioned that if in any appropriate proceeding instituted by him, *as heir, he had recovered judgment for a part of the estate, that part would have been acquired by inheritance* within the meaning of the act. We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption. It does so, because it disregards the heirship which underlay the compromise, *the status which commanded that agreement and was recognized by it.*"

This Court therefor held that the State Court held that the issues were substantial which was binding on it. It was only on this basis that the Court held that if the contest had been fought to a finish and petitioner had succeeded the property received would have been exempt.

If the distinction between a judgment and an acquisition by a compromise agreement "in lieu of a judgment is too formal to be sound" (196), a judgment and a compromise are on a parity. Therefore, the objections which result in a compromise must be co-extensive with the objections that result in a judgment. At least, the objections that result in a compromise must be substantial enough to lead to the conclusion that they could have resulted in a judgment. Chief Justice Hughes did not intend to abrogate the rule that a compromise is no evidence of merit but only of the purpose to avoid expense. *West v. Smith,* 101 U. S. 263, 273; *Tennant v. Dudley,* 144 N. Y. 504. So, necessarily, Chief Justice Hughes made that ruling based upon the fact that a substantial issue must be presented. Any other interpretation would lead to a ridiculous result.

A contrary interpretation would lead to the conclusion that there was implicit in the decision made in the *Lyeth* case, as there is implicit in the decision in the Court below that even though the objections that stayed probate of the will were concededly meritless and unsubstantial (A37), the charity was powerless to relieve itself from the helpless enthraldom and the inescapable duress in which the charity Trustees were engulfed, without payment of a tax. That the Trustees were enjoined from exercising their judgment given to them under the State Law, to extricate the charity from this predicament without subjecting the charity to punitive taxation. That there was implicit in that statement that the only way to avoid taxation was to prove in the highest court possible that the objections were meritless and by expending the vast sums necessary to so prove and to combat the issue of domicile and double taxation at whatever expense necessary to do so, and if necessary to pay double taxation. To combat the Attorney General in answer to the charge that the fiduciaries were wasting the funds of the charity, when that could have been avoided. That the tuberculosis sanitarium must await the outcome of all this vast expenditure and delay.

Such an interpretation would violate the rule that there must be transfer of property either by will or by intestacy to authorize the exaction of an estate tax. *Helvering v. St. Louis Trust Company,* 296 U. S. 39; *Knowlton v. Moore,* 178 U. S. 41; and would result in an unconstitutional taking of property without due process of law.

Chief Justice Hughes stated that whether property received by an heir from the estate of his ancestor is acquired by inheritance when it is distributed *under an agreement settling a contest by the heir of the validity of the decedent's will* is taxable, is a federal question and not a state question (191-193). Here, there was no such controversy. The will contest was abandoned.

Tax laws are not extended by implication *Gould v. Gould*, 245 U. S. 151, 153. Surely they are not distorted by implication.

The residuary estate, of course, vested in the charity trust exempt from tax on the date of death of the decedent; and the charity Trustees were vested with the total charity trust fund at the time that the negotiations hereinbefore discussed occurred. *Lederer v. Stockton*, 260 U. S. 3; *Brewster v. Gage*, 280 U. S. 327; *Warner v. Commissioner*, 72 F. 2d 225, 226-227 (C.A.A. 2d 1934); *Matter of Cook*, 187 N. Y. 253, 259; *Wager v. Wager*, 89 N. Y. 161, 166.

The respondent conceded in the Courts below that the charity also owned the income of the entire charity trust at the time of the decedent's death. Section 17(b) New York Personal Property Law; Section 162 I.R.C. Hence the payment was made by the charity trustees from the vested estate of the charity.

The will is to be construed and the taxability of the payment made by the trustee determined as of the date of death of the testator and hence the payment here made from the charity fund is exempt from estate tax.

Ithaca Trust Co. v. U. S., 279 U. S. 151, 155; *Edwards v. Slocum*, 264 U. S. 61, 62-63; *Y.M.C.A. v. Davis*, 264 U. S. 47, 50; *United States v. Provident Trust Co.*, 291 U. S. 272, 281; *Dimock v. Corwin*, 99 Fed. 2d 799; *Humphrey v. Millard*, 79 Fed. 2d 107; *Com'r v. First National Bank of Atlanta*, 102 Fed. 2d 129; *Robbins v. Comm'r*, 111 Fed. 2d 828; *Matter of Wilcox*, 194 N. Y. 288.

2. The decision below is directly in conflict with the decision of this Court in *Helvering v. Safe Deposit Co.*, 316 U. S. 56, which held, in both the prevailing and dissenting opinions, that money paid in settlement, when

objections have been filed to probate, must be paid as in intestacy and not on any extraneous ground to intestacy.

The dissenting opinion relying entirely upon the *Lyeth* case, stating this case exactly, said:

> "Moreover, the compromise was motivated by considerations other than the invalidity of the power, for the claims of the decedent's children had a large influence in bringing it about."

The decision is also contrary to the decision of the Fourth Circuit in that very case, 121 Fed. 2nd 307, 315.

The Court there said:

> "Such cases as *Lyeth v. Hoey, supra,* and *Magruder v. Segebade,* 4 Cir., 94 Fed. 2nd 177, lay down the principle that what is received by compromise, if it is a part of the very thing claimed, is of the same character for tax purposes as the claim which is compromised. Where, however, it is not of the same character, the principle does not apply. *White v. Thomas,* 5 Cir., 116 F. 2d 147, certiorari denied, May 26, 1941, 61 S. Ct. 1098, 85 L. Ed. . Here the estate in property received by the brothers and sisters of decedent under the compromise was of a different character from what they would have received under the power of appointment and did not pass under the power by reason of the compromise. See also *Housman v. Com'r,* 2 Cir., 105 F. 2d 973."

The reversal by this Court was to determine the factual issue under that ruling.

3. The decision is directly in conflict with the decision in *Housman v. C. I. R.,* 105 Fed. 2nd 973, 975, 976, cert. den., 309 U. S. 656, a decision of this very Second Circuit. Both opinions in that case held that in order to justify a tax, settlement must have been made in intestacy based on a substantial issue. Threats were made by a son to his

mother to break his father's will probated fifteen years before the threats were made, unless provision was made for him and a trust set up; and the Court held that the threats were too unsubstantial to come within *Lyeth v. Hoey*. The dissenting opinion (976), held that the dispute was bona fide and hence substantial. The importance of this decision is that both opinions held, in accordance with *Lyeth v. Hoey*, that objections must be substantial in order to justify imposing an estate tax. There was no Surrogate's Court decision there to bind it.

4. The decision is in conflict with *Middleton v. U. S.*, 99 Fed. Supp. (E.D. Pa.), 801, interpreting the decision of this Court in the *Lyeth* case, where the Court held that the general rule to be deduced from *Lyeth v. Hoey* is that where one obtains title to property as the result of a *bona fide* claim which, if sustained, would give the property to him as an heir of the decedent, and which could not be sustained unless he was an heir, it is acquired by inheritance. He must, however, continued the Court, have acquired it because his claim as an heir has been paid. The respondent here acquiesced in that decision. Here the Court below found that the objections were unsubstantial (A37). The will contest was abandoned.

5. The decision is directly in conflict with the decision of *Thompson v. Commissioner*, 123 Fed. 2d 816 (2 Cir.), relied upon by the Court below (A40). Objections to the validity of the will were filed by next of kin to probate, which named the brother and sister of testatrix as life beneficiaries and six public charities as remaindermen. The charities paid the objectants $375,000 in settlement of the will contest. The *Thompson* case is predicated on the fact that monies paid in settlement of a will contest must be paid in intestacy to sustain an estate tax. The Court recites that while the estate denied the charges of invalidity of the will, it did pay the descendants its

share, based on intestacy (817). The Court based its entire decision upon a single quotation from the *Lyeth* case. Quoting from that case, the Court relied upon the statement that there is no question that the heir obtained that portion against which a tax was sought because of his standing as an heir, *and because of his claim in that capacity*. Here, the claimants did not so take. Basing its decision that it had been so acquired, this Court in the *Lyeth* case relied upon the basic fact that a substantial issue was involved. Here, the contestants were not so paid.

Further, the Court relied on the statement in the *Lyeth* case that if petitioner in that case had succeeded in the will contest, the property would have been acquired by inheritance and hence exempt from the income tax under the Federal Act. That statement is necessarily based on the fact that a substantial issue was raised.

Relying again on the *Lyeth* case statement, which said that, in effect, the distinction between a judgment and a compromise in lieu of a judgment is not sound, because the Court adds that such distinctions disregard the heirship which underlies a compromise, *the status which commanded the compromise*. This, too, of course, is based upon a substantial contest which could result in a victory for the contestants. Here, we have demonstrated and the Court below held that the objections were unsubstantial.

The Court in the *Thompson* case then states that it cannot lightly assume that the contestants take by inheritance, free from income tax, the same amounts which the charities received as tax exempt legatees.

The answer is supplied by the compromise agreement here. Under the compromise agreement, gift taxes and income taxes are to be borne by the recipients of the money (86, 74).

In the *Thompson* case the estate paid as in intestacy without proof of any facts, as here proven, that the objections were not substantial.

Decedent and her brother and sister had made identical wills. The contestants threatened to attack all three wills. The estate claimed that part of the $325,000 paid in settlement was for releases of claims against the other two decedents who had died several years before and was totally unrelated to the will of decedent and not taxable in the estate there under review. The Court thus states the claim and its ruling thereon (818):

> "Petitioner also contends that the deductions cannot be reduced, at least not in full, by the $325,000 because, in part, it was paid to protect the estates of the testator's brother and sister against claims by the next-of-kin. Any such claims seem to have been formal only; at least, in the absence of evidence showing that part of the payment can fairly be allocated to the release of such claims, we are not justified in making an arbitrary allocation."

Here the necessary proof is submitted.

If this decision is not in conflict with the decision of the Court below, then both decisions are in conflict with *Lyeth v. Hoey,* above reviewed.

6. The decision of the Court below is directly in conflict with the decision in *In re Sage's Estate,* 122 Fed. 2nd 480 (3rd Cir.), cert. den. 314 U. S. 699, which the Court below held supported the decision in *Thompson's Estate v. Com'r,* 123 Fed. 2nd 816, C.C.A. 2nd (A40), above reviewed, and supported the respondents' contention that the payment herein made need not be made in intestacy to authorize taxation. In that case the decedent left his wife, declared an incompetent, household effects and $42,000 of his $450,000 estate, and the residue to a Scotch Fraternal Lodge. When objections were filed

the Scotch Fraternal Lodge independently agreed to pay to the widow, for the withdrawal of the objections to the probate of the will, 25 per cent of its residuary estate. The Court there relied entirely upon the same quotations from *Lyeth v. Hoey*, as are relied upon in the *Thompson* case, above reviewed, and by the petitioners herein. The same answers apply. The Court, referring to the *Lyeth* case, did say (483):

> " 'It is equally certain that he did not take under the intestate law. As here, there was no intestacy. Yet, he took by "inheritance." And, what he received he took because his standing as heir—the status which commanded that (compromise) agreement and was recognized by it.' "

This, of course, is a contradiction and a misinterpretation of the *Lyeth* case.

Inheritance has been defined as the estate cast upon an heir-at-law immediately upon the death of the ancestor. *Brown & Hadley, Century Dictionary.* To take as heir necessarily is to take by inheritance; and to take as heir necessarily is to take by intestacy; which is exactly what the *Lyeth* case held. To take as heir necessarily there must have been the automatic devolution of estate direct from the ancestor's estate by operation of law based on intestacy. *Matter of Williams*, 162 Misc. 507, 509, affirmed 254 App. Div. 741.

The law of descent and distribution and of intestacy as the *Lyeth* case held is necessarily governed by State law and not by Federal law. *Clark v. Allen*, 331 U. S. 507, 517; *U. S. v. Fox*, 94 U. S. 315, 320; *Helvering v. Rhodes Estate*, 117 Fed. 2nd 509, 510 (8 Cir.); *Robbins v. C. I. R.*, 111 Fed. 2nd 828, 832 (1st Cir.). Of course, testacy and intestacy can co-exist. A will may be valid as to all but a residuary legacy which may be declared void and descendable in intestacy. *Wright v. Wright*, 225 N. Y. 329, 339-340.

The Court then proceeds in the *Sage* case to base its decision on a matter totally unrelated to the issue here. The Court quotes part of what is now 812 (d) I.R.L., emphasizing it as follows (484, A31):

> "The amount of all bequests, legacies, devises, or transfers, * * * to a trustee * * *, *but only if such contributions or gifts are to be used by such trustee * * * exclusively for religious, charitable, scientific, literary, or educational purposes* * * * (Emphasis supplied.) The Lord Provost was a trustee for the charitable use contemplated by the testator. The amount deductible could not, therefore, exceed the sum which the Lord Provost used exclusively for charitable purposes. Obviously, he could not so use what he did not actually receive. And as a result of the compromise agreement, he received, for the charitable uses contemplated by the testator, only three-fourths of the residuary estate, while the remaining one-fourth went to a use not charitable."

It was upon the above quotation from the Act that the Court based its decision that the amount received by the Lodge "must measure the quantum of the deduction allowable" (484) and quoted by the Court below as the ultimate basis of its decision (A40). It bears no relation to the issue here presented. That provision is omitted from the District Court's quotation of the Act (169-170). It is totally foreign to the issue here presented.

The exemption to a fraternal society operating under the lodge plan is subject to the mandatory condition that "such gifts are to be used exclusively" for eleemosynary purposes (A31). A lodge engages in activities other than eleemosynary. *Levey v. Smith*, 103 Fed. 2d 643, 645 (7th Cir.), cert. den. 308 U. S. 578. Hence, the peremptory condition. The Court found that the lodge itself breached the imperative condition.

Here the exemption is to a corporation *organized and operated exclusively* (A31) for eleemosynary purposes, possessing the plenary powers of an eleemosynary corporation. *Dartmouth College v. Woodward,* 4 Wheat. 518; Footnote 1, *re Sage, supra,* p. 484. The Treasury Department here expressly declared that petitioner's charitable vested estate was exempt from income and estate taxation (101-103) and defendant has admitted that the income and principal of the charity fund vested in the charity on decedent's death.

If the *Sage* case decision is deemed to support the respondent it is in conflict with the decision of this Court in the *Lyeth* case.

7. The decision of the Court below is in conflict with the decisions of *Dumont's Estate v. C. I. R.,* 150 Fed. 2nd 691, 693 (3rd Cir.), and *Commercial National Bank of Charlotte v. U. S.,* 196 Fed. 2nd 182 (4 Cir.); both of which, relying on the *Lyeth* case, expressly hold that to warrant an estate tax the payment made on a settlement when objections to probate have been filed must be paid in intestacy pursuant to substantial objections which could have terminated in overthrowing the will.

8. The decision of the Court below is in conflict with the decisions in *White v. Thomas,* 116 F. 2d 147 (5th Cir.) (Cert. den. 313 U. S. 581); *Mertz v. Hickey,* 162 F. 2d 403, 405 (2nd Cir.); *Hull v. Continental Ill. Nat'l Bank and Trust Co.,* 177 F. 2d 217, 220 (7th Cir.); *Hale v. Anglim,* 140 F. 2d 235, 236 (9th Cir.); *Raytheon Prod. Corp. v. C. I. R.,* 144 F. 2d 110, 114 (1st Cir.) (Cert. den. 323 U. S. 779); *C. I. R. v. Pierce,* 146 F. 2d 388, 390 (2nd Cir.); *Jones v. Corbyn,* 186 F. 2d 450, 453 (10th Cir.) all of which cases uniformly held, interpreting *Lyeth v. Hoey,* that the governing factor decisive of taxation is that the payment made must be made pursuant to a

substantial claim made either in testacy or intestacy i. e., a claim made in testacy or intestacy and a payment made of a claim for merchandise owing to the claimant is not within the rule of *Lyeth v. Hoey.*

9. The decision of the Court below is, therefore, directly in conflict with the decisions of this Court in *Lyeth v. Hoey,* 305 U. S. 188, and *Helvering v. Safe Deposit Company,* 316 U. S. 56, and in conflict with all decisions heretofore set forth in the 1st, 2nd, 3rd, 4th, 5th, 7th, 9th and 10th Circuits interpreting *Lyeth v. Hoey, supra,* and *Helvering v. Safe Deposit Company, supra,* creating irreconcilable confusion in the interpretation of *Lyeth v. Hoey* and *Helvering v. Safe Deposit Company,* on the issue of estate taxation on the filing of unsubstantial objections to probate of a will and the rights and duties of fiduciaries with respect thereto.

The decision of the Court below is directly in conflict with the decisions of this Court in *Helvering v. St. Louis Trust Co.,* 296 U. S. 39, and *Knowlton v. Moore,* 178 U. S. 41, holding that the exaction and collection of an estate tax is prohibited except on death resulting in testacy or intestacy and is in direct conflict with the Estate Tax Law providing for the exaction of an estate tax only on death resulting in testacy or intestacy and the exaction and forced payment of such tax as made herein constitutes a taking of vested property of the charitable trust herein involved without due process of law and a taking of such property without just compensation contrary to the provisions of Amendment V of the Constitution of the United States (A34).

The decision of the Court below, by its ruthless disregard of the constitutional inhibition to give full faith and credit to the Records and Judicial Proceedings of the Surrogate's Court of the State of New York and of the

proceedings had in said court by its reversal of the decree of said Court approving a compromise agreement pursuant to a state statute (Decedent Estate Law, §19) (A32-A34), by directing payment of a part of the Cargill claim against the estate of the decedent, based on filed reports of officials of the said Surrogate's Court and the Attorney General of New York State and the uncontradictable evidence in said Surrogate's Court that the discretion of the Surrogate's Court was impeccably invoked and exercised to prevent spoliation of the charity fund by saving vast expense to said fund and interminable delay in erecting the free tuberculosis sanatorium under decedent's will, violated petitioners' rights under Article IV, Section 1 of the Constitution of the United States (A34), and is contrary to the decisions of this Court in *Huron Corp. v. Lincoln Co.*, 312 U. S. 183, 193, 194, and *Davis v. Davis*, 305 U. S. 32, 40, and is contrary to Section 1738, Title 28 U. S. C. (A35), and the decision of *Durlacher v. Durlacher*, 123 F. 2d 70, 71 (9th Cir.).

By the acts aforesaid the decision of the Court below violated petitioners' constitutional rights under Amendment X of the Constitution of the United States on the ground that the Court below, by said reversal of said New York State Surrogate's decree and the Records and Proceedings had therein, usurped and arrogated to itself and to the United States a power not delegated to the U. S. and reserved to the States (A35), and is contrary to the decisions of this Court in *U. S. v. Burnison*, 339 U. S. 87, 91, and *U. S. v. Fox*, 94 U. S. 315, 320.

The decision is also contrary to the decisions of this Court holding that the administration of estates under said Amendment X is exclusively within the jurisdiction of the State Court (A35) in said, *Lyeth v. Hoey*, 305 U. S. 188, 193; *Blair v. Commission*, 300 U. S. 5, 9-10, and cases cited; in *Dumont Estate v. C. I. R.*, 150 F. 2d 691, 693

(3rd Cir.); *Helvering v. Rhodes Estate,* 117 F. 2d 509, 510 (8th Cir.); *Robbins v. C. I. R.,* 111 F. 2d 828, 832 (1st Cir.).

The decision of the Court below violates said Amendment X (A35) by failure to apply the law of intestacy of the State of New York herein and is contrary to the decision of this Court in said *Lyeth v. Hoey,* 305 U. S. 188; *Clark v. Allen,* 331 U. S. 507, 517; and *Helvering v. Rhodes Estate,* 117 F. 2d 509, 510; *Robbins v. C. I. R.,* 111 F. 2d 828, 832 (1st Cir.), relying on said *Lyeth* case.

It is, therefore, necessary that petitioners' violated Constitutional rights be protected and conserved by an authoritative decision by this Court.

It is of the utmost importance to the petitioners herein, especially to the corporate petitioner which is a fiduciary in many estates, and to all fiduciaries throughout the country that *Lyeth v. Hoey,* be upheld as interpreted by all the Courts in Circuits hereinabove mentioned and as interpreted by petitioners and that such interpretation be authoritatively settled by this Court in order that all fiduciaries may be apprised that on the filing of unsubstantial objections, fiduciaries are not automatically bereft of the right to exercise their judgment given them under State law, in the administration of estates to extricate the charity from a stay of probate and indefinite delay.

Because of the grave responsibility imposed on fiduciaries, it is of monumental importance that the decision below be reviewed and the law settled by a decision of this Court in order that fiduciaries may know whether the only alternative open to such fiduciaries on the filing of unsubstantial objections is to pay the tax on the amount paid, not in intestacy, but for the necessary vacatur of the stay of probate by the withdrawal of the unsubstantial

objections, or whether to combat the objection of domicile and the issues of double taxation and pay a double tax at any cost, and thus delay decedent's private charity until the combat is concluded, even though the delay causes irreparable injury to sufferers of tuberculosis, cancer or polio.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

BENJAMIN M. CARDOZO,
Attorney for Petitioners.

ELI J. BLAIR,
Counsel.

APPENDIX A.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOKED.

APPLICABLE INTERNAL REVENUE CODE SECTION 812, TITLE 26, AS IT EXISTED ON DATE OF DEATH OF DECEDENT, FEBRUARY 21, 1942.

"§812. Net Estate

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate * * *"

* * * * * * *

"(d) *Transfers for public, charitable, and religious uses.*

The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by; such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, and no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation * * *"

§19 of the New York Decedent Estate Law as it existed during 1942, the time of the issue herein.

§19. COMPROMISE OF CONTROVERSIES ARISING BETWEEN CLAIMANTS TO PROPERTY OR ESTATES WHERE THE INTERESTS OF INFANTS, INCOMPETENTS OR PERSONS UNKNOWN OR NOT IN BEING ARE OR MAY BE AFFECTED.

(a) The Supreme Court or the Surrogate's Court having jurisdiction of the estate or property involved may authorize executors, administrators and trustees to adjust by compromise any controversy that may arise between different claimants to the estate or property in their hands to which agreement such executors, administrators or trustees and all other parties in being who claim an interest in such estate and whose interests are affected by the proposed compromise shall be parties in person or by guardian as hereinafter provided.

(b) The Supreme Court or the Surrogate's Court having jurisdiction of the estate or property involved may likewise authorize the person or persons named as executors in one or more instruments purporting to be the last will and testament of a person deceased, or the petitioners for administration with such will or wills annexed, to adjust by compromise any controversy that may arise between the persons claiming as devisees or legatees under such will or wills and the persons entitled to or claiming the estate of the deceased under the statutes regulating the descent and distribution of intestate estates, to which agreement or compromise the persons named as executors or the petitioners for administration with the will annexed, as the case may be, those claiming as devisees or legatees and those claiming the estate as intestate, shall be parties, provided that persons named as

executors in any instrument who have renounced or shall renounce such executorship and any person whose interest in the estate is unaffected by the proposed compromise shall not be required to be parties to such compromise.

(c) Where an infant, lunatic, person of unsound mind or habitual drunkard is a necessary party to a compromise under this section he shall be represented in the proceedings by a special guardian appointed by the Court, who shall in the name and on behalf of the party he represents make all proper instruments necessary to carry into effect any compromise that is sanctioned by the Court.

(d) If it appears to the satisfaction of the Court that the interests of persons unknown or the future contingent interests of persons not in being are or may be affected by the compromise, the Court must appoint some suitable person or persons to represent such interests in the compromise and to make all proper instruments necessary to carry into effect any compromise that is sanctioned by the Court. In the event that by the terms of any compromise made pursuant to this section money or property is directed to be set apart or held for the benefit of or to represent the interest of infants, incompetents or persons unknown or unborn, the same may in a proper case be paid or deposited in Court and remain subject to the order of the Court.

(e) An agreement of compromise made in writing pursuant to this section, if found by the Court to be just and reasonable in its effects upon the interests in said estate or property of infants, lunatics, persons of unsound mind, unknown persons or the future contingent interests of persons not in being, shall be valid and binding upon such interests as well as upon the interests of adult persons of sound mind.

(f) An application for the approval of a compromise pursuant to this section must be made by petition duly verified, which shall set forth the provisions of any instruments or documents by virtue of which any claim is made to the property or estate in controversy and any and all facts relating to the claims of the various parties to the controversy and the possible contingent interests of persons not in being and all facts which make it proper or necessary that the proposed compromise be approved by the Court. The Court in its discretion may entertain such application prior to the execution of the proposed compromise by all the parties required to execute it and may permit the execution by the necessary parties to be completed after the inception of the proceeding for approval thereof if the proposed compromise has been approved by the estate representatives described in subdivisions (a) and (b) of this section. After taking proof of the facts either before the Court or by a Referee and hearing the parties and fully examining into the matter the Court must make an order upon the application. In the Surrogate's Court the order may also be made in any pending proceeding.

CONSTITUTIONAL PROVISIONS INVOKED.

PERTINENT TEXT OF ARTICLE IV, SECTION 1.

Article IV.—States—Reciprocal Relationship between States and with United States

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. * * *.

Pertinent Text of §1738, Title 28, U. S. C.

"§1738. *State and Territorial statutes and judicial proceedings; full faith and credit*

* * * The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions * * *.

Such Acts, records and judicial proceedings or copies thereof, * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

PERTINENT TEXT ON AMENDMENT V.

"AMENDMENT V—CAPITAL CRIMES: DUE PROCESS

No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"AMENDMENT X—RESERVED POWERS TO STATES

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

APPENDIX B.

Opinion of the Court Below.

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 199 October Term, 1954

Argued March 8, 1955 Decided April 5, 1955

Docket No. 23349

IRVING TRUST COMPANY and ERNEST CRAWFORD MAY, as Executors of the Will of Charles H. Hastings, deceased,
Plaintiffs-Appellants,

against

UNITED STATES OF AMERICA,
Defendant-Appellee.

Before Medina and Hincks, Circuit Judges, and Burke, District Judge.

Plaintiffs appeal from an order of the United States District Court for the Southern District of New York granting summary judgment in favor of defendant in an action to recover estate taxes paid under protest. Gregory F. Noonan, Judge. Opinion below not yet reported. Affirmed.

Cardozo & Cardozo, New York City, New York (Eli J. Blair, Benjamin M. Cardozo and Lewis B. Greenbaum, New York City, New York, of counsel) for plaintiffs-appellants.

J. Edward Lumbard, United States Attorney for the Southern District of New York, New York City, New York (Thomas C. Burke, Assistant United States Attorney, New York City, New York, of counsel) for defendant-appellee.

MEDINA, Circuit Judge:

This is an appeal by the executors of the estate of Charles H. Hastings from an order granting defendant's cross-motion for summary judgment in an action to recover federal estate taxes paid under protest.

The decedent died on February 21, 1942, and certain heirs at law, next of kin and distributees filed objections to the probate of the will which, after setting up a few annuities and a gift of $5,000 to a friend, left the bulk of the estate for the charitable purpose of founding and maintaining a sanitarium for the study, prevention, treatment and cure of tuberculosis. As so often seems to be the case there was little to support the claims of lack of testamentary capacity and defective execution of the will; but the delay and expense incidental to a trial of the issues raised by the objections and the possibility of a domiciliary dispute and the payment of taxes both in New York and California provided a powerful incentive to the making of some compromise. The estate was a large one, of about $4,000,000 at the time of the death of the testator, and it was difficult to find some basis on which to negotiate. A solution to this psychological problem was found, however, in an agreement made by the testator on September 13, 1914, by the terms of which

Clinton M. Ostrander, Reba Cargill Stanley, Ida A. Cargill and Mabel Townsend Switzer, the residuary legatees under the will of the testator's sister, Lizzie Hastings Holme, agreed that the testator should share equally with them in the Holme residuary estate, although he had not been named as such in the will. The amount thus received by the testator was $130,732.61, a sum close enough to what the executors were willing to pay to compromise the will contest to serve as a point of departure in the settlement discussions. One of these residuary legatees under the Holme will was Ida A. Cargill, a 95-year-old cousin of the half blood and she appears to have been disappointed that the testator did not make provision in his will for certain needy relatives, at least in the amount he had thus received from the estate of his sister; and there was also some proof that she was piqued because no list of relatives had been left by the decedent with his attorneys. This dissatisfaction, which doubtless furnished part of the motivation for the will contest, is continually referred to in appellants' argument as a "claim" which was supposedly disposed of by the compromise agreement which we are about to describe.

The compromise or settlement agreement, dated November 12, 1942, while containing lengthy and elaborate provisions for court approval and the identification of the various heirs and next of kin who were to share in the monies to be paid over, was the ordinary form of agreement made in such cases and the nub of it was that the objections to probate were withdrawn and those established as the heirs at law, next of kin or distributees of the testator were to be paid the sum of $182,500. The agreement also provided that all federal and state "estate taxes, if any, required to be paid by reason of the payment of said sum of $182,500 * * * shall be paid out of the estate of said testator," and that the payment to the various persons named was to be "in full satisfac-

tion and discharge of all claims which the Contestants or any of them or any other party hereto may have or claim to have in, to, against or in respect of the estate of said testator."

The compromise was approved by the Surrogate's Court of New York County, and the will admitted to probate on December 15, 1942. On February 1, 1943, the sums mentioned in the agreement were paid by the executors.

Despite the fact that both sides moved for summary judgment, there being no dispute about the underlying facts, appellants make much of the circumstance that the pretrial order formulated as an issue to be tried, "What was the probability that the will contestants would succeed in establishing their objections to the probate of decedent's will dated January 23, 1939?" But this did not preclude the Court from later deciding that no trial whatever was necessary and that summary judgment should be granted. The functions of the Pretrial Conference described in Rule 16 and the Summary Judgment motion provided in Rule 56 of the Federal Rules of Civil Procedure are entirely different. They complement one another; each serves its own special purpose. Upon a proper showing that there is no genuine issue to be tried, a judge may grant a motion for summary judgment wholly irrespective of the terms of a pretrial order specifying a number of issues which remained after the discussion at the Pretrial Conference had eliminated others. It is the purpose of the Pretrial Conference to simplify the issues, shape up the testimonial and documentary evidence and generally clear the decks for the trial. The function of the summary judgment motion, on the other hand, is to sift the proofs pro and con as submitted in the various affidavits and exhibits attached thereto, so that a determination may be made, without the expense and delay of a trial, that there are or are not real, as distinct

from mere fictitious or paper issues, which must be disposed of in the traditional manner by trial to the court or jury. Thus here the Court below correctly passed over the supposed issue as to the Ida A. Cargill "claim," as having no substance whatever. There was no such "claim," nor was the compromise agreement based upon any payment in settlement of any such "claim." The money was paid for the withdrawal of the objections to the probate of the will, the release of all claims by everyone concerned was no more than a necessary and usual incident to such a transaction. What gave this the appearance of an issue was the undoubted fact that the transaction of September 13, 1914, coupled with the failure of decedent to make provision for his needy relatives, provided the motive for the contest and the formula which led to the settlement. The so-called issue about the Ida A. Cargill "claim" was pure sham; and the very function of the summary judgment motion is to eliminate sham issues.

On the law the case is governed by our decision in *Thompson's Estate v. Commissioner,* 123 F. 2d 816 (C. C. A. 2, 1941), which cites with approval *Sage v. Commissioner,* 122 F. 2d 480 (C. C. A. 3, 1941), where the Third Circuit cut down to the quick of the problem presented by these will contest settlement cases by holding that the amount received by the charity, to be devoted to charitable uses, must "measure the quantum of the deduction allowable."

The attempt to bring this case within the rule of *Helvering v. Safe Deposit & Trust Co.,* 316 U. S. 56 (1942), collapsed when the true nature of the so-called Ida A. Cargill "claim" became apparent. To have directed a trial to proceed for the purpose of deciding the amount of the $182,500 which "can fairly be allocated" to the settlement of this supposed "claim" would have been a waste

of time and expense for all concerned, as the entire amount was paid to settle the will contest. Moreover, even had there been substance to the "claim," we think no deduction should have been allowed, except in such amount as was received by the charity to be devoted to charitable uses. The *Helvering* case did not involve a charitable deduction; and the facts found to justify the direction in that case for a separate allocation differ radically from those before us here, as the settlement money there was paid in part for the withdrawal of a substantial assertion of property rights arising out of powers of appointment set up in wills of entirely different decedents, which it was claimed fell in for failure of a proper exercise of the powers.

Affirmed.

Judgment of the Court Below.

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of April, one thousand nine hundred and fifty-five.

Present:

Hon. Harold R. Medina,
Hon. Carroll C. Hincks,
Circuit Judges.

Hon. Harold P. Burke,
District Judge.

IRVING TRUST CO. & ANO.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

Endorsed "United States Court of Appeals
Second Circuit
Filed Apr 5, 1955
A. DANIEL FUSARO, Clerk"

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and Regulations involved	2
Statement	2
Argument	5
Conclusion	9
Appendix	10

CITATIONS

Cases:	
Commercial National Bank v. *United States, 196* F. 2d 182	5
Commissioner v. *Sternberger's Estate*, 348 U. S. 187	6
Dumont's Estate v. *Commissioner*, 150 F. 2d 691	5
Hastings, Matter of, 183 N. Y. Misc. 517, 49 N. Y. S. 2d 524	9
Helvering v. *Safe Deposit Co.*, 316 U. S. 56	5
Lyeth v. *Hoey*, 305 U. S. 188	6, 7
Sage's Estate, In re, 122 F. 2d 480, certiorari denied, 314 U. S. 699	5, 7
Thompson's Estate v. *Commissioner*, 123 F. 2d 816	5, 6
Statute:	
Internal Revenue Code of 1939, Sec. 812 (26 U. S. C. 1952 ed., Sec. 812)	5, 10
Miscellaneous:	
E. T. 17, 1940–1 Cum. Bull. 231	5
Treasury Regulations 105, Sec. 81.44	6, 11

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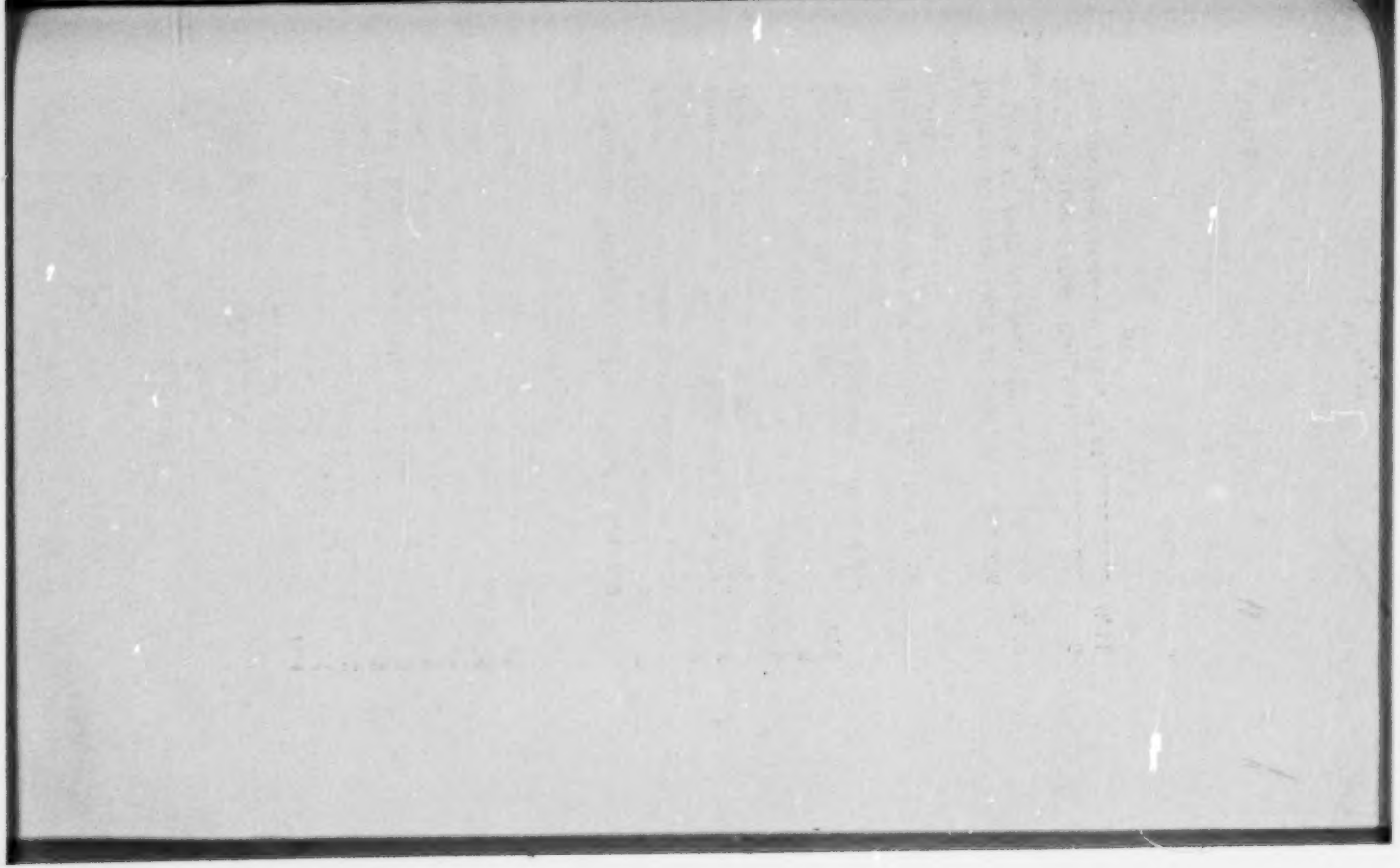

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 138

IRVING TRUST COMPANY AND ERNEST CRAWFORD MAY, AS EXECUTORS OF THE WILL OF CHARLES H. HASTINGS, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 36–41) is reported at 221 F. 2d 303. The opinion of the District Court (I R. 168–170)[1] is reported at 129 F. Supp. 303.

[1] References to the part of the record printed in the "Appendix to Appellants' Brief" in the court below are designated (I R. —) and to the part of the record printed in "Appendix to Appellee's Brief" in the court below are designated (II R. —).

JURISDICTION

The judgment of the Court of Appeals was entered on April 5, 1955 (Pet. 42–43). The petition for a writ of certiorari was filed on June 9, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether the deduction allowable for federal estate tax purposes for a bequest to charity under the terms of decedent's will was properly reduced by an amount paid by the executors to the decedent's heirs in settlement of a contest of his will.

STATUTE AND REGULATIONS INVOLVED

The statute involved, Internal Revenue Code of 1939, Section 812 (d), and Treasury Regulations 105, Section 81.44, are set forth in the Appendix, *infra*, pp. 10–11.

STATEMENT

This suit was brought to recover estate taxes paid by petitioner under protest. The suit was based upon the contention raised in a timely refund claim that an amount of $182,500 paid by the executors to the next of kin of decedent in settlement of a will contest was not includible in decedent's gross estate.

Decedent died on February 21, 1942 (Pet. 37; II R. 1). By the terms of his will, his estate, after the payment of a few annuities and bequests, was left for the charitable purpose of founding

and maintaining a sanitarium for the prevention and cure of tuberculosis (Will, par. Twelfth, I R. 44; Pet. 37). Upon the will being offered for probate in the Surrogate's Court, New York County, objections were filed by certain of the decedent's heirs, next-of-kin and distributees (hereinafter called "heirs"), certain cousins of the half blood, on the ground of lack of testamentary capacity and improper execution (I R. 21–22, 107–108; Pet. 37). Following negotiations between the heirs and the representatives of the estate a compromise agreement was entered into between the contestants and decedent's executors, taxpayers herein (I R. 63–89; Pet. 37–38).

Under the compromise agreement, the sum of $182,500 was to be paid by the executors to the contestants. In consideration therefor, the contestants agreed to withdraw their objections to the probate of the will. The agreement was subject to the approval of the Surrogate's Court, New York County. A condition precedent to the payment and settlement was that, at the time of approval of the agreement by the Surrogate, no persons other than the four contestants should have been established as having been heirs at law, next-of-kin or distributees of the decedent at the time of his death (I R. 70–76).

After the compromise agreement was approved by the Surrogate's Court, the will was admitted to probate (I R. 96–100) and on February 1, 1943, the executors, taxpayers herein, paid $182,500 to

decedent's heirs (I R. 4). Subsequently, a corporation named The Hastings Foundation was organized pursuant to the provisions of decedent's will. The Treasury advised this corporation that it qualified as a charitable corporation, bequests to which were deductible for estate tax purposes under Section 812 (d) of the Internal Revenue Code of 1939 (I R. 4, 101–103).

Thereafter taxpayers filed an estate tax return on behalf of the estate. So much of the estate tax reported and paid as resulted from the inclusion in the taxable estate of the $182,500 paid in settlement of the will contest was protested on the ground that this amount should have been allowed as part of the charitable deduction (II R. 2–3, 7). A timely claim for refund was filed and thereafter the executors commenced this action.

Taxpayers moved for summary judgment and annexed to their notice of motion (I R. 8) various affidavits designed to establish that the next-of-kin of the decedent could not have succeeded in establishing their objections to probate if the contest had proceeded to trial. The Government filed a cross-motion for summary judgment (I R. 167).

The trial court held that the question as to the probability that the next-of-kin could have succeeded in establishing their objections to probate was immaterial and that, as a matter of law, the sum of $182,500 paid to the contestants in their status as next-of-kin of the decedent was not

deductible from the gross estate as a charitable bequest under Section 812 (d) of the Code (I R. 168–171). Accordingly, the court granted the Government's motion, and judgment was entered dismissing the complaint (I. R. 171). The Court of Appeals for the Second Circuit affirmed (Pet. 36–43).

ARGUMENT

This case presents no question calling for review by this Court. The decision below is correct and in accordance with the decisions of this Court. No conflict of decisions is presented.

1. Under Section 812 (d) of the Internal Revenue Code of 1939 (App., pp. 10–11), bequests or transfers to corporations organized exclusively for charitable purposes are deductible from the gross estate of decedents for purposes of the estate tax. However, the $182,500 in issue in this suit was not transferred for a charitable purpose but, as held by the two courts below on the admitted facts, was paid in compromise of the will contest to the contestants in their capacity as heirs of the decedent. It is settled that no deduction is allowable with respect to such payments. *Helvering* v. *Safe Deposit Co.*, 316 U. S. 56, 64–65; *In re Sage's Estate*, 122 F. 2d 480 (C. A. 3d), certiorari denied, 314 U. S. 699; *Thompson's Estate* v. *Commissioner*, 123 F. 2d 816 (C. A. 2d); *Dumont's Estate* v. *Commissioner*, 150 F. 2d 691 (C. A. 3d); *Commercial National Bank* v. *United States*, 196 F. 2d 182 (C. A. 4th); E. T. 17, 1940–1 Cum. Bull. 231.

These cases follow the rationale of *Lyeth* v. *Hoey*, 305 U. S. 188, where the Court held that a payment to an heir in compromise of a will contest was received "by inheritance" and accordingly was exempt from income tax. As the court below said in an earlier decision on the point, "we cannot lightly assume that the contestants take 'by inheritance,' so as to be free from income tax, the very same amounts which the charities receive as 'legacies' so as to permit an estate tax deduction". *Thompson's Estate* v. *Commissioner*, 123 F. 2d 816, 817.

This result is in accord with the applicable regulations which have stood since 1942, during which period Section 812 (d) has several times been amended. See *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 190. The regulations provide that if as a result of a controversy involving a charitable bequest, "the charitable organization assigns or surrenders a part thereof pursuant to a compromise agreement in settlement of such controversy, the amount so assigned or surrendered is not deductible as a bequest or devise to such charitable organization." Treasury Regulations 105, Section 81.44 (App., p. 11). In the instant case, the payments in compromise were never even received by the charity, but were paid by the executors directly to the heirs to induce them to withdraw their objections to probate. It follows *a fortiori* that no deduction should be allowed. See *Thompson's Estate* v. *Commissioner*,

123 F. 2d 816, 817–818 (C. A. 2d). The amount received by charity to be devoted to charitable uses must "measure the quantum of the deduction allowable". *In re Sage's Estate,* 122 F. 2d 480, 484 (C. A. 3).

Petitioners recognize the rule that payments to heirs in settlement of a will contest out of funds bequeathed to charity are not deductible, but contend that the rule is applicable only where the issues in the will contest are "substantial." Their claim of conflict of decisions (Pet. 14, 19, 20, 22, 25, 26) is based on this contention. There is, however, no conflict of decisions. In none of the cases cited by petitioner was the probability of the heirs' success in the will contest held to have any bearing upon the result. Indeed, in *Lyeth* v. *Hoey,* 305 U. S. 188, this Court explicitly rejected the argument that the heir contesting the will could not be held to have received the agreed payments by inheritance because the heir realized on a "bargaining position" and had but "the expectations" of an heir. The Court stated (*id.* at 197):

> He was heir in fact. Whether he would receive any property in that capacity depended upon the validity of his ancestor's will and the extent to which it would dispose of his ancestor's estate. When, by compromise and the decree enforcing it, that disposition was limited, what he got from the estate came to him because he was heir, the compromise serving to remove

> *pro tanto* the impediment to his inheritance. * * *

So here, the fact that the heirs may have capitalized on their "bargaining position" is beside the point. What the heirs received came to them because they were heirs, and accordingly, as the courts below held, was not excludible from the gross estate as a transfer for charitable purposes.

2. Petitioners attempt to buttress their argument with the suggestion that the payments were made to the heirs for some purpose other than in settlement of a will contest (Pet. 5–7). But in their complaint (II R. 2–3) and refund claim (II R. 7), petitioners themselves stated that the $182,500 was paid in settlement of the will contest. Moreover, the objections filed by the contestants, the compromise agreement, and the orders of the Surrogate's Court support no other view of the transaction (I R. 70–71, 72–73, 76, 83, 86–87, 90, 97–98, 107–108). There is no substance whatsoever to petitioners' characterization of Mrs. Cargill's contentions as a "claim"; indeed her attorney explicitly disclaimed that decedent had committed himself contractually to do anything for her (I R. 143). The court below properly rejected the so-called Cargill issue as "pure sham" (Pet. 40).

Petitioners argue that under New York law the payment to the heirs must be deemed to have been made other than in settlement of a will

contest (Pet. 5–7, 18, 23, 26–28). But this Court need not speculate as to the New York law. A New York court, considering the tax consequences of the payment under the similarly worded New York estate tax statute some ten years prior to the decision by the trial court in this case, viewed the payment to the heirs as having been made in settlement of a will contest, and following "the rule established in the federal cases," held, like the court below, that "the exemption applicable to the charitable gift must exclude the sum paid in satisfaction of the contest." *Matter of Hastings,* 183 N. Y. Misc. 517, 49 N. Y. S. 2d 524 (Surr. Ct., N. Y. County).

CONCLUSION

The decision of the court below is correct and in accordance with the decisions of this Court. No conflict of decisions is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Special Assistants to the Attorney General.

JULY 1955.

APPENDIX

Internal Revenue Code of 1939:

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(d) [As amended by Sec. 408 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 511 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Transfers for Public, Charitable, and Religious Uses.*—The amount of all bequests, legacies, devises, or transfers * * * to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or ani-

mals. If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate.

(26 U. S. C. 1952 ed., Sec. 812.)

Treasury Regulations 105, promulgated under the Internal Revenue Code of 1939:

SEC. 81.44 *Transfers for public, charitable, religious, etc., uses.*— * * *

* * * * *

If as the result of a controversy involving a charitable bequest or devise, the charitable organization assigns or surrenders a part thereof pursuant to a compromise agreement in settlement of such controversy, the amount so assigned or surrendered is not deductible as a bequest or devise to such charitable organization.

U. S. GOVERNMENT PRINTING OFFICE: 1955

FILED
SEP 2 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 138.

IRVING TRUST COMPANY and ERNEST CRAWFORD MAY, as Executors of the Will of CHARLES H. HASTINGS, deceased,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS.

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Index.

Page

I. Question Presented and Statement 1

II. Argument 8

III. The Petition for the Writ of Certiorari Should be Granted 12

Conclusion 12

Citations.

Adams v. Mills, 286 U. S. 397, 416 5

Adrico Realty Corp. v. City of New York, 250 N. Y. 29, 33-34, 40, 41 6

Atlantic Brewing Co. v. Wm. J. Brennan Grocery Co., 79 Fed. 2nd 45, 47 6

Berger v. Brannan, 172 F. 2d 241, 242-243 3

Chicago Ry. Co. v. Merchants' Bank, 136 U. S. 268 5

Columbia Fins Co. v. Boykin, 185 Fed. 2nd 771, 777 4

Dominion National Bank v. Olympia Cotton Mills, 128 Fed. 181 6

Dutcher v. Porter, 63 Barb. (N. Y.) 15, 18 5

Estate of Sanford v. Com'r, 308 U. S. 39 9

Euclid Candy Co. v. Whitney Central Trust Co., 48 Fed. 2nd 757, 758 4

Ewing v. Gardner, 341 U. S. 321 12

Feyh v. Brandtjen & Kluge, 207 Misc. 171 6

George A. Fuller Co. v. McCloskey, 228 U. S. 194, 201-202 6

Godwin v. Liberty-Nassau Blding Co., 144 App. Div. 164 5

Page

Harrison v. Pullman Co., 68 Fed. 2nd 826, 827 5
Hervey v. R. I. Locomotive Works, 93 U. S. 664 5
Heryford v. Davis, 102 U. S. 235 5
Hespe v. Corning Glass Works, 9 Fed. Supp. 725, 728 6
Higgins v. Smith, 308 U. S. 473, 478 10
Hofferbert v. Marshall, 200 F. 2d 648, 652 6
Holy Trinity Church v. U. S., 143 U. S. 457, 459, et seq. 5
Hormel v. Helvering, 312 U. S. 522, 556 6
Hull v. Burr, 234 U. S. 712, 720-721 5

Lahman v. Burnes National Bank, 20 Fed. 2nd 897, 899 4
Lewis v. Atlas Corp., 158 Fed. 2nd 599, 600 4
Lyeth v. Hoey, 305 U. S. 188 12
Lyeth v. Hoey, 305 U. S. 188 (6-7, 5) 5
Lyons v. Empire Fuel Co., 262 Fed. 465, 471-472 5

Marion Co. Co-op. Ass'n Carnation Co., 214 F. 2d 557, 562 5
Marks Musical Corp. v. Continental Record Co., 222 F. 2d 488, 491-492 4
Martin v. Imbre, 262 Fed. 44 4
Matter of Hastings, 183 Misc. 517, 519 11
Minnich v. Gardner, 192 U. S. 48, 53 5
Missouri Pac. Ry. Co. v. Hellmich, 12 Fed. 978, 980 .. 9

Osgoodby v. Talmadge, 45 Fed. 2nd 696, 697 5
Owens v. Schwartz, 177 F. 2d 641, 644 3

Peacock v. Williams, 110 Fed. 910 6
Perlmutter v. Beth David Hospital, 308 N. Y. 100, 107-108 4

Rickard v. Farmer's Museum, 284 App. Div. 140, 142 4
Ricketts v. Waller, 81 Fed. 2nd 977, 979 4

Page

Securities and Exchange Commission v. Otis, 338 U. S. 843, id. 888 12
Sisco v. McNutt, 209 F. 2d 550, 553 6
Steinberger Estate Case, 348 U. S. 187 (R. B. 6) 9

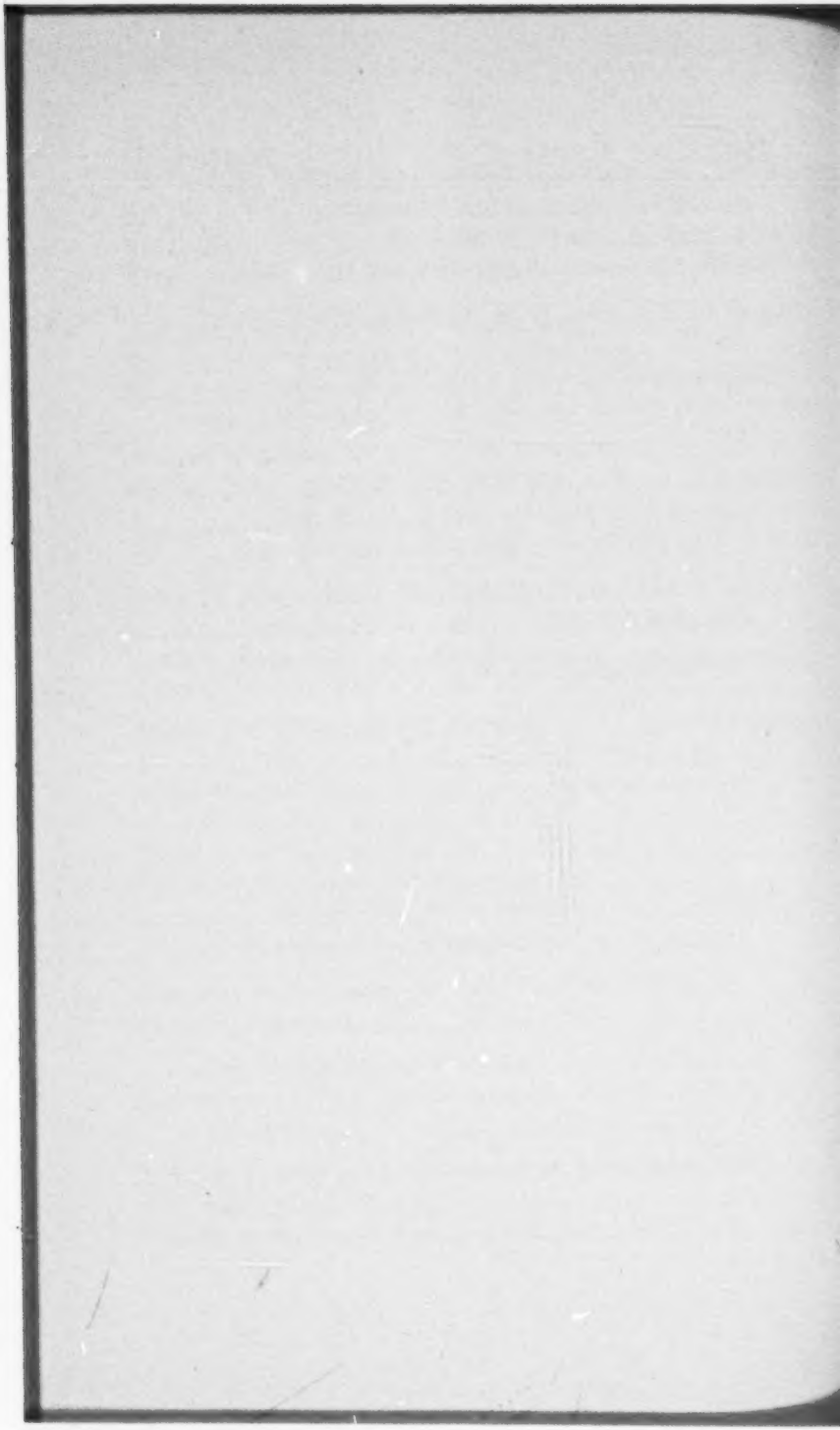
Thomas v. Mut. Ben. H. & A. Ass'n, 220 F. 2d 17, 18 5
Trailmobile v. Whirls, 331 U. S. 40, 50 6
Trentham v. Canal Ins. Co., 117 F. Supp. 241, 246-247 3

United Rys. v. West, 280 U. S. 234, 248-249 5
U. S. v. Bethlehem Steel Co., 315 U. S. 325-330 6
U. S. v. One Rio Truck Auto, 9 Fed. 2nd 529, 530 5

VanNorden v. Chas. R. McCormick Lumber Co., 17 Fed. 2nd 568, 570 5

Welch v. Warner, 47 F. 2d 232, 235, id. 231, 232 12

Rules:
Rule 15(b) F. R. C. P. 4



Supreme Court of the United States

OCTOBER TERM, 1954.

No. 138.

IRVING TRUST COMPANY and ERNEST CRAWFORD MAY, as Executors of the Will of Charles H. Hastings, deceased,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONERS.

Reply is made to the matters in respondent's brief set forth under the captions "Question Presented" and "Statement" and under the caption "Argument."

I.

Question presented and statement.

The "Question Presented" by respondent includes as a factor moneys paid to decedent's heirs in settlement of a contest of his will (R. B. 2). This is at least inaccurate. There was no amount paid to decedent's heirs in settlement of a contest of his will.

The respondent's entire brief, its every argument and conclusion is predicated on the premise that the money taxed was paid to decedent's remote next of kin in settlement of a will contest (R. B. 2, 3, 4, 5, 6, 7, 8, 9).

The premise upon which the conclusion is based is false, hence the entire brief falls, and irreconcilable conflict of decisions shown in the petition stands admitted.

The only pretext respondent asserts for this false premise is that the complaint in the action (R. B. 4, 8) alleges that the money was paid in settlement of a contest over the probate of decedent's will (R. 2-3) which purports to interpret a statement in the claim for refund that the sums were paid in settlement of a will contest (R. 7).

The summary answer to this claim is that again respondent is barred from making this belated claim in this Court. On the pre-trial hearing, respondent gave its written consent, incorporated in an order of the Court entered December 3, 1952 (1), that the issue to be tried was, what was the probability that the contestants would succeed in establishing their objections to the probate of decedent's will (7, 5).

Respondent then necessarily knew perfectly well that petitioners' claim was that there was no settlement made "of the validity of the decedent's will" (Pet. 17). Respondent then necessarily knew perfectly well that an answer in favor of the Charity trust to that agreed formulated issue would prove that there was no will contest, and hence that no payment was made in intestacy.

Respondent then knew perfectly well that petitioners' claim was that they paid part of the Ida Cargill claim for the withdrawal of the objections solely to save the vast expense of combatting the domicile and double tax issues and the delay in erecting the testamentary tuberculosis sanitarium. A decision that objectants would be unsuccessful in their attack on decedent's will would corroborate the foregoing statement and prove conclusively that no settlement was made "of the validity of decedent's will."

If respondent did not know that the isolated verbiage now seized upon did not have the meaning claimed by the petitioners, it would have objected at the pre-trial hearing that the issue to be tried was not within the pleadings and would not have consented as it did, that no amendments were necessary to the pleadings (3). Clearly, the "issue" now sought to be created was permanently "weeded out," and eliminated as non-existent by the pre-trial order formulating the issues to be tried, entered on the written consent of respondent. *Owens v. Schwartz,* 177 F. 2d 641, 644; *Trentham v. Canal Ins. Co.,* 117 F. Supp. 241, 246-247; *Berger v. Brannan,* 172 F. 2d 241, 242-243.

Petitioners' entire evidence was served on respondent on May 27, 1954 (1). The hearing was held on June 22, 1954. The Trial Court decided the case four months after the service of petitioners' evidence and on September 24, 1954 (2). Respondent necessarily knew, when the evidence was served, that petitioners vehemently contended that they adamantly refused to settle a will contest and to pay in intestacy, and that they paid part of the Ida Cargill claim, as proven by Surrogate's Court records, a matter which was totally extraneous to the validity of the will, solely to save expense and delay. Hence, it is plain that it was never intended by the allegations now seized upon, to allege that the payments were made in intestacy, based on substantial objections, and the evidence served clearly conveyed that thought to the respondent.

During this long interval, not the remotest suggestion of a claim was made that the evidence was not in accordance with the pleadings.

By failing to assert this claim on petitioners' motion for summary judgment in the Trial Court and then on its own cross-motion for summary judgment respondent has now irrevokably and eternally abandoned and waived the right to contradict petitioners' version of the issue involved. *Marks Musical Corp. v. Continental Record Co.*, 222 F. 2d 488, 491-492.

Further respondent cannot, after the decision by the Trial Court, for the first time on appeal contend that the evidence is not in accordance with pleadings if all the evidence was admitted without objection. *Martin v. Imbre*, 262 Fed. 44; *Columbia Fins Co. v. Boykin*, 185 Fed. 2nd 771, 777; *Lewis v. Atlas Corp.*, 158 Fed. 2nd 599, 600; *Euclid Candy Co. v. Whitney Central Trust Co.*, 48 Fed. 2nd 757, 758; *Ricketts v. Waller*, 81 Fed. 2nd 977, 979; *Lahman v. Burnes National Bank*, 20 Fed. 2nd 897, 899.

Rule 15(b) F. R. C. P. provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Respondent by express and implied consent admitted that no will contest was settled but that part of an alleged claim was paid to save expense and delay (9-166). It is now too late to recant. *Marks Musical Corp. v. Continental Record Co.* (*supra*). Respondent's only claim in the Trial Court was that any money paid for the withdrawal of objections is taxable, even though not paid in intestacy based on substantial objections to the will. That is its only claim now (R. B. 7). It is now ineludibly estopped to attempt to contradict or distend the firmly intrenched rule that a cause of action is what it is in reality and in law and not what it is called. *Perlmutter v. Beth David Hospital*, 308 N. Y. 100, 107-108; *Rickard v. Farmers' Museum*, 284 App. Div. 140, 142;

Hervey v. R. I. Locomotive Works, 93 U. S. 664; *Heryford v. Davis,* 102 U. S. 235; *Chicago Ry. Co. v. Merchants' Bank,* 136 U. S. 268; *Godwin v. Liberty-Nassau Blding Co.,* 144 App. Div. 164, 166; *Holy Trinity Church v. U. S.,* 143 U. S. 457, 459, *et seq.*

The overwhelming uncontradictable proof shows that respondent knew and acted on the knowledge that petitioner's claim was that no contest involving the validity of decedent's will was settled within the ruling of *Lyeth v. Hoey,* 305 U. S. 188 (6-7, 5).

Thus inescapably estopped respondent cannot now descend to nomenclature and rudimentary semantics in opposing this application.

A supporting concomitant companion rule provides that the theory upon which the cause of action was tried cannot be changed on appeal. *Minnich v. Gardner,* 192 U. S. 48, 53; *Adams v. Mills,* 286 U. S. 397, 416; *United Rys. v. West,* 280 U. S. 234, 248-249; *Hull v. Burr,* 234 U. S. 712, 720-721; *Lyons v. Empire Fuel Co.,* 262 Fed. 465, 471-472; *Osgoodby v. Talmadge,* 45 Fed. 2nd 696, 697; *Harrison v. Pullman Co.,* 68 Fed. 2nd 826, 827; *Van Norden v. Chas. R. McCormick Lumber Co.,* 17 Fed. 2nd 568, 570.

When, therefore, a case is tried on the concession that the facts are all admitted and only a question of law is submitted for decision, respondent cannot change the theory on appeal and dispute the facts. *Thomas v. Mut. Ben. H. & A. Ass'n,* 220 F. 2d 17, 18; *Marion Co. Co-op. Ass'n v. Carnation Co.,* 214 F. 2d 557, 562; *U. S. v. One Rio Truck Auto,* 9 Fed. 2nd 529, 530; *Dutcher v. Porter,* 63 Barb. (N. Y.) 15, 18.

The instantly apparent reason for the rule is that without its application the adversary will have permanently

lost the opportunity to cure by amendment or supply by additional proof the effect of the objections. *Hormel v. Helvering,* 312 U. S. 552, 556; *Trailmobile v. Whirls,* 331 U. S. 40, 50; *Atlantic Brewing Co. v. Wm. J. Brennan Grocery Co.,* 79 Fed. 2nd 45, 47; *Sisco v. McNutt;* 209 F. 2d 550, 553; *Hofferbert v. Marshall,* 200 F. 2d 648, 652; *George A. Fuller Co. v. McCloskey,* 228 U. S. 194, 201-202.

Judged by the law of pleading, where frivolity is determined on a mere inspection of a plea without argument, this feigned issue should be instantly condemned and exterminated from the record. *Peacock v. Williams,* 110 Fed. 910; *Dominion National Bank v. Olympia Cotton Mills,* 128 Fed. 181; *Hespe v. Corning Glass Works,* 9 Fed. Supp. 725, 728.

The filed objections stayed probate of the will and stayed the erection of the tuberculosis sanitarium. The money was thereupon necessarily paid under duress of property for the withdrawal of the objections. Authorities collated by Frankfurter, J. *U. S. v. Bethlehem Steel Co.,* 315 U. S. 325-330; *Adrico Realty Corp. v. City of New York,* 250 N. Y. 29, 33-34, 40, 41; *Feyh v. Brandtjen & Kluge,* 207 Misc. 171. This is far from a settlement "of the validity of the decedent's will" (Pet. 17) through fear of its invalidity.

Respondent erroneously states that petitioners' affidavits were designed to show only the frivolity of the objections to probate (R. B. 4). Respondent fails to state that the ostensible will contest was abandoned and that the "negotiations" (R. B. 3) referred to were of the settlement of the Ida Cargill claim instituted by Special Guardian Nicoll and that the admitted record evidentiary facts so prove. Respondent fails to state that the negotiations ended by settlement and payment of part of the Ida

Cargill claim (26-41, 116-119, 139-142, 144-152, 155-156). Respondent fails to state that petitioners' admitted proof showed that no will contest was settled but a claim was settled solely to save expense and delay to the charity (R. B. 4).

While the District Court did (R. B. 4) rule, contrary to the respondent's repudiated written agreement (7, 5) that the probability that contestants would succeed in establishing their objections to decedent's will (7) was immaterial, the error was corrected by the Court below, which held that there was no such probability (A-37, 38). Hence, there was no bona fide contest by the heirs of the "validity of the decedent's will" (Pet. 17).

The obvious reason for the warranty of genealogy in the compromise agreement (R. B. 3) was to make full certain that no other collateral relatives would appear to stay probate and again frustrate indefinitely the work of the charity trustees in the erection of the tuberculosis sanitarium.

The compromise agreement in its entirety (R. B. 3, 8) confirms this view and respondent is estopped to contradict it (*ante* 2-6, Pet. 5-8, 11-12, 27-28). The evident purpose (the nature of the filed objections designedly omitted therefrom 70, 72, 73, 97, 98), was to close every conceivable avenue of invasion to which this charitable trust could again become prey.

The Surrogate's decrees, based on Reports of Special Guardians and the Attorney General, approving the compromise agreement by settlement of the Ida Cargill claim to save delay and expense to the charity trust (91, 93), effectuated that purpose. The order approving this agreement does not even mention the filing of objections or a will contest (90-95, Pet. 10).

The fact stands glitteringly admitted that the money was not paid in intestacy in settlement of a contest of the validity of decedent's will based on substantial objections that could possibly lead to a judgment declaring the will invalid.

II.

Argument.

The Court below did not hold on admitted facts (R. B. 5) that the money was paid to the heirs in a compromise of the will contest. There was no will contest.

The District Court held, unconstitutionally usurping the power of the Surrogate, that the payment made even in the interest of expediency was hardly justified (Pet. 11-12, 27-28). The Court below ruled that there was no merit to the filed objections (37, 38), but the tax was imposed under a here irrelevant provision of the Estate Tax Law relating to fraternal lodges (Pet. 24-25).

The Court below (R. B. 5) had no constitutional power to overrule the Surrogate by arbitrarily holding that the payment was made to settle a will contest, when the State Court admitted records irrefutably prove payment was made to save the expense and delay of combating the domicile and double tax issues in aid of the charity.

The cases cited (R. B. 5) are based on the false premise that the money was paid in settlement of a bona fide will contest and hence are inapplicable. These cases infallibly support petitioners' contentions, plainly showing a conflict of decisions in the absence of the false premise.

The regulation invoked by respondent (R. B. 6, 11) is wholly immaterial and foreign to the issues here pre-

nted. That regulation refers to a controversy over "the lidity of the decedent's will." It cannot legitimately fer to any other kind of a controversy, because to be xable the payees must take as in intestacy under a bona le contest "of the validity of the decedent's will." "That gulation is powerless to enlarge the act." *Missouri Pac. y. Co. v. Hellmich,* 12 Fed. 978, 980.

In any event there was no controversy pending involv- g a charitable bequest whereby a "charitable organiza- on" surrendered a part of its bequest pursuant to a mpromise of such controversy. The money was ad- ittedly paid on matters totally extraneous to any con- oversy in aid of the charity to save expense and delay. he money was not payable to an independent separate eneral "charitable organization," but was paid to dece- nt's own private individual charity supported by dece- nt's money in perpetuity. It is that charity that is reft of the money taxed. If the executors dominated the oney and the payments made therefrom, as respondent consistently asserts (R. B. 6), the "charitable organiza- on" was then powerless to "surrender" part of the arity money. If such regulation is as enigmati- l as the utterances of the Oracle of Delphi, and tended as a "catch-all," it cannot possibly support the spondent. The regulation cannot overrule the statutory d decision law. *Missouri Pac. Ry. Co. v. Hellmich,* 12 d. 2d 978, 980, reversed on other grounds, 273 U. S. 2; *Estate of Sandford v. Com'r,* 308 U. S. 39.

The sole reason for the reversal by this Court of the *ernberger Estate* case, 348 U. S. 187 (R. B. 6), was at it was utterly impossible to apply concretely the rule d maxim *id certum est quod certum reddi potest.* The sue here relates to a fund indefeasibly vested in in the arity trust at decedent's death.

The quotation from the *Sage* case (R. B. 7) applies only to a non-eleemosynary corporation (Pet. 24-25).

Respondent's statement that the charity never received the money paid, but that it was paid directly by the executors (R. B. 6) is again contradicted by the respondent's stipulation. In answer to the pretrial order issue (6-7) as to what income was received by the executors prior to payment to the Hastings Foundation, and what was done with it (R. B. 6, 7), respondent conceded in both courts below that the income and principal were credited to the charity from the date of death of decedent (Pet. 18). *Higgins v. Smith*, 308 U. S. 473, 478.

The charity trustees and the executors were the same persons, and the negotiations were conducted by them as charity trustees (117, 118, 120-121, 140, 141, 155, 156 160, 162, 163, 23, 24, 26, 31, 35). The compromise agreement runs to the charity trustees as well as to the executors (81, 82, 83, 63). The only reason the action is brought by the executors is that the law commands it. The fact that the Attorney General, the statutory overseer of charities, intervened and consented to the settlement of part of the Ida Cargill claim to save expense to the charity (35), is proof conclusive that charity money was paid by the charity trust in aid of the charity and not in intestacy.

The quotation from the *Lyeth* case (R. B. 7-8), as we have demonstrated (Pet. 14-20), is based on substantial objections that could have resulted in a victory for the objectants, and not on an ostensible and abandoned will contest where payment was made for reasons extraneous to the validity of the will. Contrary to respondent's statement (R. B. 7) two co-existing elements are necessary to sustain the estate tax:

(a) an heir; (b) payment to the heir made pursuant to a settlement of a substantial controversy involving the validity of the will of decedent (Pet. 17-20, 25-26).

Not only is the Court below constitutionally barred from attacking the Cargill claim (R. B. 8) for the reasons stated in the petition (Pet. 11-12, 27-28), but the attack is wholly unwarranted and not based on any factual premises leading to that unjust conclusion. Contrary to the statement of the respondent (R. B. 8) the attorney for Ida Cargill did contend that the estate was obligated contractually to pay the Cargill claim (138, 130). However, that is immaterial now. The Surrogate did approve the settlement on the basis of the Cargill claim to save the vast expense and delay involved.

The Surrogate's decision in *Matter of Hastings,* cited (R. B. 9) is wholly valueless in aid of the issue here. The Surrogate reluctantly held (519) that he was bound to follow Federal decisions in Estate Tax cases and could have no independent opinion.

Except by valueless attempted dogmatic assertions, absent ratiocination, the petition remains unanswered. The respondent has unnecessarily attempted to inject confusion in what is a simple question based on conceded Court records and facts.

In order to release the testamentary charity trust from its helpless imprisonment by duress, and on the condition precedent that the will was valid, and not in intestacy, the charity trustees paid part of an alleged claim solely to save the charity trust the vast expense and delay of combatting threatened domicile and double tax issues, with the full authority of the Attorney General of the State of New York, and sanctioned by the Surrogate of New York County, having exclusive jurisdiction in the premises. Plainly this forthright and wholesome transaction is not taxable under the Estate Tax Law.

III.

The petition for the writ of certiorari should be granted.

It is obviously apparent that the petitioners' application is based on immutable and conclusively uncontradictable evidence and every fact alleged in the moving papers is admitted to be true on the Motion for Summary Judgment. Based on these immutable and stabilized premises the conclusion automatically flows that the decision below clearly violates petitioners' constitutional rights and is overwhelmingly contrary to law and clearly contrary to the decision of this Court in *Lyeth v. Hoey,* 305 U. S. 188, and all cases following and interpreting that decision.

The petitioners therefore most seriously and with the utmost sincerity respectfully submit to the consideration of this Court that the judgment herein should be summarily reversed on this application and the refund granted to the petitioners when, as here, "* * * it would be idle to allow the cause to go on to an inevitable outcome which we can now predict." *Welch v. Warner,* 47 F. 2d 232, 235 *id.* 231, 232; *Securities and Exchange Commission v. Otis,* 338 U. S. 843, rehearing denied *id.* 888; *Ewing v. Gardner,* 341 U. S. 321.

CONCLUSION.

In any event, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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